

11-1-2011

Election Law and Government Ethics

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Recommended Citation

Christopher R. Nolen & Jeff Palmore, *Election Law and Government Ethics*, 46 U. Rich. L. Rev. 119 (2019).

Available at: <https://scholarship.richmond.edu/lawreview/vol46/iss1/6>

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ELECTION LAW AND GOVERNMENT ETHICS

Christopher R. Nolen *

Jeff Palmore **

I. INTRODUCTION

The last two years have produced modest “tweaks” to Virginia’s election laws. Most notably, 2011 ushered in the decennial tradition of reapportionment and redistricting. This article surveys developments in Virginia election law for 2010 and 2011 and focuses on those statutory developments that have significance or general applicability to the implementation of Virginia’s election laws. Consequently, not every election-related bill approved by the General Assembly is discussed.

II. LEGISLATIVE ENACTMENTS

A. *Electoral Boards and Officers of Election*

1. Eligibility to Serve on Electoral Board

The Virginia Code currently imposes a number of restrictions on the eligibility to serve on a local electoral board. Sitting federal, state, or local officeholders; their deputies;¹ candidates for such elected office;² state, local, and legislative district party chairmen;³ and paid campaign staffers⁴ are prohibited from serving as members of local electoral boards. Beginning in 2012, this

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1. VA. CODE ANN. § 24.2-119 (Repl. Vol. 2011).

2. *See id.* § 24.2-106 (Repl. Vol. 2011).

3. *Id.*

4. *Id.*

list will also include a number of relatives of candidates or incumbent officeholders, such as spouses, grandparents, parents, siblings, children, or grandchildren.⁵ In order to prevent a stream of electoral board resignations during a redistricting year, the General Assembly approved an amendment from the governor to delay the effective date of the legislation to January 1, 2012.⁶

2. Appointment and Training of Officers of Election

The General Assembly enacted a change to the way local electoral boards select officers of election to serve in precincts. Under the previous law, in addition to selecting an equal number of representatives of the two major political parties,⁷ the electoral board could also select additional citizens not representing any party.⁸ Beginning in 2010, the additional non-party representatives, if practicable, can make up no more than one-third of the officers of election for each precinct.⁹ Additionally, substitute or additional officers of election selected after the deadline are to be chosen, if practicable, from lists provided by the two major political parties.¹⁰

While the law previously required training of officers of election,¹¹ in 2010 the General Assembly imposed a requirement that the local electoral board annually certify that its officers have been trained at least every four years according to the standards set by the State Board of Elections ("State Board").¹²

Also as a result of the 2010 legislation, the secretary of a local electoral board must now provide a list of officers of election to po-

5. Act of Apr. 6, 2011, ch. 764, 2011 Va. Acts ____ (codified as amended at VA. CODE ANN. § 24.2-106 (Repl. Vol. 2011)).

6. See *id.*; H. JOURNAL, House of Delegates of Va., Spec. Sess. ____ (2011), available at <http://lis.virginia.gov/cgi-bin/legp604.exe?111+amd+HB1508AG>.

7. Technically, "representation shall be given to each of the two political parties having the highest and next highest number of votes in the Commonwealth for Governor at the last preceding gubernatorial election." VA. CODE ANN. § 24.2-106 (Repl. Vol. 2011). In practice, representation is given to the Republican and Democratic Parties. See *id.* § 24.2-115 (Repl. Vol. 2011).

8. *Id.* § 24.2-115 (Repl. Vol. 2011).

9. Act of Mar. 29, 2010, ch. 190, 2010 Va. Acts 263, 263 (codified as amended at VA. CODE ANN. § 24.2-115 (Cum. Supp. 2010)).

10. *Id.*

11. VA. CODE ANN. § 24.2-103(B) (Repl. Vol. 2006).

12. Act of Apr. 13, 2010, ch. 769, 2010 Va. Acts 1397, 1397 (codified as amended at VA. CODE ANN. §§ 24.2-103, -115 (Cum. Supp. 2010)).

litical parties and candidates upon request and payment of reasonable fees.¹³ The list should include the precinct to which the officers are assigned and the officers' political party designation.¹⁴

B. Voter Registration

In order to ensure the accuracy of voter rolls and to prevent voter fraud, the General Assembly made a number of statutory changes to ensure the accuracy and integrity of voter registration records. Specifically, the General Assembly made two changes to help ensure that voters are not registered in more than one state. First, for new Virginia voters who previously lived in another state, the portion of their application showing their previous address will now be sent to the state where the applicant previously resided.¹⁵ Second, in order to assist in maintaining accurate voting systems, the State Board may now share information it receives from other Virginia agencies, such as the Department of Motor Vehicles, with chief elections officers in other states.¹⁶ Additionally, the General Assembly imposed a requirement in 2011 that general registrars delete voters from the rolls within thirty days of notification of a disqualifying event.¹⁷ Finally, the State Board must promptly notify the registrar of information that would cause removal from the voter rolls.¹⁸

One additional change to voter registration was the 2011 passage of legislation backed by the National Rifle Association¹⁹ that would make voter registration applications available where hunting and fishing licenses are sold.²⁰

13. Act of Apr. 10, 2010, ch. 347, 2010 Va. Acts 524, 525 (codified as amended at VA. CODE ANN. §§ 24.2-103, -115 (Cum. Supp. 2010)).

14. *Id.*

15. Act of Apr. 21, 2010, ch. 795, 2010 Va. Acts 1667, 1668 (codified as amended at VA. CODE ANN. § 24.2-418(C) (Cum. Supp. 2010)).

16. See Act of Mar. 25, 2011, ch. 528, 2011 Va. Acts ____ (codified as amended at VA. CODE ANN. § 24.2-404(A)(9) (Repl. Vol. 2011)).

17. *Id.* (codified as amended VA. CODE ANN. § 24.2-409(A)(4) (Repl. Vol. 2011)).

18. *Id.*

19. *Virginia: NRA-Backed Legislation Moves to Full Senate Committee, Castle Doctrine Passed Over for the Day*, NAT'L RIFLE ASS'N INST. FOR LEGIS. ACTION (Jan. 19, 2011), <http://www.nraila.org/legislation/read.aspx?id=6130>.

20. Act of Mar. 16, 2011, ch. 225, 2011 Va. Acts ____ (codified as amended at VA. CODE ANN. § 24.2-416.3(B) (Repl. Vol. 2011)); Act of Mar. 16, 2011, ch. 197, 2011 Va. Acts ____ (codified as amended at VA. CODE ANN. § 24.2-416.3(B) (Repl. Vol. 2011)).

C. *Absentee Ballots*

1. Administration of Absentee Ballot Process

In 2010, the General Assembly made several changes to the process for administering absentee ballots. It added to the list of persons that could vote by absentee ballot those that have “been designated by a political party, independent candidate, or candidate in a primary election to be a representative of the party or candidate inside a polling place on the day of the election.”²¹ Presumably, this addresses the situation in which a person spends most, if not all, of the day volunteering for a candidate as a poll watcher at a location that is not his regular voting location.

The General Assembly also expanded the definition of “immediate family” for the purposes of late absentee voting due to a family emergency that arises within three days before the election.²² Specifically, the definition was expanded to include adopted children and legal guardians of the applicant; also, the term “sibling” was further defined as “whole or half blood.”²³

The 2010 General Assembly also clarified what information related to absentee ballot applications may only be inspected or copied. Political parties and candidates may now only inspect, not copy, applications for absentee ballots.²⁴ The General Assembly also provided that “[u]pon request and for a reasonable fee, the State Board . . . shall provide an electronic copy of the absentee voter application list to any political party or candidate.”²⁵ Moreover, “[s]uch list shall be used only for campaign and political purposes.”²⁶

21. Act of Apr. 8, 2010, ch. 244, 2010 Va. Acts 342, 343 (codified as amended at VA. CODE ANN. § 24.2-700 (Cum. Supp. 2010)).

22. Act of Apr. 11, 2010, ch. 539, 2010 Va. Acts 997, 998 (codified as amended at VA. CODE ANN. § 24.2-705.1 (Cum. Supp. 2010)).

23. *Id.*

24. Act of Apr. 9, 2010, ch. 316, 2010 Va. Acts 449, 449 (codified as amended at VA. CODE ANN. § 24.2-706 (Cum. Supp. 2010)).

25. Act of Apr. 7, 2010, ch. 213, 2010 Va. Acts 297, 297 (codified as amended at VA. CODE ANN. § 24.2-706 (Cum. Supp. 2010)).

26. Act of Apr. 21, 2010, ch. 812, 2010 Va. Acts 1702, 1704 (codified as amended at VA. CODE ANN. § 24.2-706 (Cum. Supp. 2010)).

2. Counting of Absentee Ballots

The 2011 General Assembly enacted legislation seeking to correct an inconsistency in the way absentee ballots were counted.²⁷ If a person voted absentee on an electronic voting machine at a general registrar's office, that person's ballot could not be retrieved and annulled if he subsequently died.²⁸ If a person voted absentee via a mail-in ballot, subsequently died, and the local electoral board was aware of the death, the ballot was not counted.²⁹ To correct this disparate treatment, the General Assembly adopted legislation to provide that an absentee ballot properly cast by a person that subsequently dies "shall be counted pursuant to the procedures set forth in this chapter if the voter is found to have been entitled to vote at the time that he returned the ballot."³⁰

The General Assembly granted more flexibility to local electoral boards in reviewing absentee ballots and applications immediately following the election. The law required "the general registrar [to] deliver all applications for absentee ballots for the election, under seal, to the clerk of the circuit court for the county or city."³¹ The General Assembly retained that requirement but also provided an exception that allows the general registrar to

retain all applications for absentee ballots until the electoral board has ascertained the results of the election pursuant to § 24.2-671, and has determined the validity of and counted all provisional ballots pursuant to § 24.2-653, at which point all applications shall then be delivered, under seal, to the clerk of the circuit court for the county or city.³²

This flexibility will assist in the local electoral board's determination of the vote during what is referred to as the "canvass" the day after the election.

27. Michael Sluss, *Delegate Seeks to Fix Absentee Vote Inequality*, ROANOKE TIMES, Jan. 20, 2011, at A10.

28. *Id.*

29. *Id.*

30. See Act of Mar. 26, 2011, ch. 654, 2011 Va. Acts ____ (codified as amended at VA. CODE ANN. § 24.2-709(C) (Repl. Vol. 2011)).

31. VA. CODE ANN. § 24.2-710 (Repl. Vol. 2006).

32. Act of Apr. 11, 2010, ch. 601, 2010 Va. Acts 1082, 1082 (codified as amended at VA. CODE ANN. § 24.2-710 (Cum. Supp. 2010)).

D. *Conduct of Elections*

1. Voting Equipment

As Virginia continues its phase-out of direct recording electronic voting machines ("DREs"), the General Assembly in 2010 added an exemption to the prohibition on acquiring DREs³³ and then modified that exemption in 2011.³⁴ In 2010, localities gained the ability to acquire DREs in order to meet accessibility requirements for those with disabilities, but they could only acquire the machines from other localities within Virginia.³⁵ Presumably because of a shortage of machines, the 2011 General Assembly modified this exception to allow localities to purchase DREs for this purpose from any source.³⁶ At the same time, however, the legislation increased the oversight of the State Board and included an expiration date of June 30, 2012, for the provision.³⁷

In 2011, the Commonwealth also made a change to how localities can deal with their existing DREs. Localities, with prior authorization from the State Board, may now modify their DREs in order to comply with state or federal accessibility requirements.³⁸

To address the needs of those precincts with a high number of perennial absentee voters, the 2010 General Assembly modified the way that localities calculate the number of voting machines needed per precinct.³⁹ The number of machines needed in a precinct was set out in the Virginia Code based on the number of voters registered to vote in that precinct.⁴⁰ Beginning in 2010, the locality could exclude absentee voters from that calculation.⁴¹

33. Act of Apr. 11, 2010, ch. 533, 2010 Va. Acts 990, 991 (codified as amended at VA. CODE ANN. § 24.2-626 (Cum. Supp. 2010)); Act of Apr. 10, 2010, ch. 356, 2010 Va. Acts 530, 531 (codified as amended at VA. CODE ANN. § 24.2-626 (Cum. Supp. 2010)).

34. Act of Mar. 24, 2011, ch. 481, 2011 Va. Acts ____ (codified as amended at VA. CODE ANN. § 24.2-626 (Repl. Vol. 2011)); Act of Mar. 24, 2011, ch. 447, 2011 Va. Acts ____ (codified as amended at VA. CODE ANN. § 24.2-626 (Repl. Vol. 2011)).

35. Ch. 356, 2010 Va. Acts at 531; ch. 533, 2010 Va. Acts at 991.

36. See ch. 481, 2011 Va. Acts ____; ch. 447, 2011 Va. Acts ____.

37. See ch. 481, 2011 Va. Acts ____; ch. 447, 2011 Va. Acts ____.

38. Act of Mar. 15, 2011, ch. 153, 2011 Va. Acts ____ (codified as amended at VA. CODE ANN. § 46.2-626 (Repl. Vol. 2011)).

39. Act of Apr. 7, 2010, ch. 214, 2010 Va. Acts 298, 298 (codified as amended at VA. CODE ANN. § 24.2-627 (Cum. Supp. 2010)).

40. VA. CODE ANN. 24.2-627(A) (Repl. Vol. 2006).

41. Ch. 214, 2010 Va. Acts at 298.

2. Electronic Pollbooks

In a significant change to how localities manage Election Day activities, Virginia made the switch in 2010 to electronic pollbooks.⁴² In 2003, the General Assembly authorized a pilot program to test the use of electronic pollbooks.⁴³ Beginning with the 2010 elections, Virginia transitioned to electronic pollbooks, and the State Board no longer provides paper pollbooks.⁴⁴ The change was made to help make voting faster and easier by reducing waiting time at polling places.⁴⁵ An added benefit is that electronic pollbooks give officers of election the information to help direct voters to the correct voting location if they show up to the wrong precinct.⁴⁶ The transition, however, did not come without problems. In Virginia Beach, for example, an insufficient number of laptops arrived from the vendor in time for the 2010 election, and the city's electoral board voted not to use electronic pollbooks for that election, despite spending thousands of dollars on the technology.⁴⁷

After the 2010 experience with (almost) statewide use of electronic pollbooks, the General Assembly revisited the matter in 2011, making one minor change. In the event that the electronic pollbook fails and no printed voter list is available, the officers of election must create a written list of those voting and give each voter a provisional ballot.⁴⁸

42. Act of Apr. 21, 2010, ch. 812, 2010 Va. Acts 1702, 1704 (codified as amended at VA. CODE ANN. § 24.2-611(B) (Cum. Supp. 2010)).

43. Act of Apr. 2, 2003, ch. 1015, 2003 Va. Acts 1619, 1631 (codified as amended VA. CODE ANN. § 24.2-611 (Cum. Supp. 2003)).

44. Ch. 812, 2010 Va. Acts at 1704. According to information from the State Board, thirty-five Virginia localities have not yet completed the transition to electronic pollbooks. E-mail from Donald Palmer, Sec'y, State Bd. of Elections, to author (Sept. 14, 2011, 9:15 AM) (on file with author).

45. *Faulty Laptops Force Voting Audible*, VIRGINIAN-PILOT, Oct. 20, 2010, <http://asq.org/qualitynews/qnt/execute/displaySetup?newsID=9833>.

46. *Hoping Electronic Pollbooks Will Mean Shorter Lines in Primary*, WILLIAMSBURG YORKTOWN DAILY, June 5, 2009, <http://www.wydaily.com/local-news/2200-hoping-electronic-pollbooks-will-mean-shorter-lines-in-primary-html/>.

47. See *Faulty Laptops Force Voting Audible*, *supra* note 45.

48. Act of Apr. 6, 2011, ch. 810, 2011 Va. Acts ____ (codified as amended at VA. CODE ANN. § 42.2-611(E) (Repl. Vol. 2011)).

3. Closure of Polling Places

Virginia law already provided for the circumstance where an emergency requires closure of a polling place because it is unusable or inaccessible.⁴⁹ In such cases, the local electoral board had to provide an alternative polling place, subject to the approval of the State Board.⁵⁰ In 2010, the General Assembly added a requirement that the local board notify all candidates, whose name appears on that election's ballot, or their campaign.⁵¹ The legislation also clarified the circumstances under which a polling place could be closed. It added a definition for "emergency," defining it as "a rare and unforeseen combination of circumstances, or the resulting state, that calls for immediate action."⁵²

4. Campaign Apparel at Polling Places

The 2008 presidential election shined a spotlight on the wearing of campaign-related apparel at a polling place. In response to a 2008 State Board policy banning campaign-related apparel within forty feet of a polling precinct and a resulting arrest,⁵³ the General Assembly passed legislation in 2009 making clear that voters could wear t-shirts, hats, stickers, buttons, or other apparel that identified a candidate while voting.⁵⁴ The General Assembly revisited this issue in 2010 to make clear that the ability to wear stickers or apparel did not extend to candidates, representatives of candidates, or anyone who approaches or enters a polling

49. VA. CODE ANN. § 24.2-310(D) (Repl. Vol. 2006).

50. *Id.*

51. Act of Apr. 11, 2010, ch. 639, 2010 Va. Acts 1155, 1156 (codified as amended at VA. CODE ANN. § 24.2-310(D) (Cum. Supp. 2010)).

52. *Id.*

53. State Board of Elections Policy 2008-007, Oct. 14, 2008; *see also* Rob Humphreys, *ACLU Defends Arrested Madison Voter*, STAR EXPONENT, Dec. 14, 2008, http://www2.star-exponent.com/news/2008/dec/14/aclu_defends_arrested_madison_voter-ar-333448/.

54. Act of May 6, 2009, ch. 874, 2009 Va. Acts 2865, 2869 (codified as amended at VA. CODE ANN. § 24.2-604(K) (Cum. Supp. 2009)); Act of May 6, 2009, ch. 870, 2009 Va. Acts 2845, 2850 (codified as amended at VA. CODE ANN. § 24.2-604(K) (Cum. Supp. 2009)); Act of May 6, 2009, ch. 865, 2009 Va. Acts 2830, 2834 (codified as amended at VA. CODE ANN. § 24.2-604(K) (Cum. Supp. 2009)).

place for a purpose other than voting.⁵⁵ For those individuals, such stickers, buttons, and apparel are prohibited.⁵⁶

5. Poll Watchers

Candidates for election and political parties often send observers, or “poll watchers,” to monitor the activities in the polling place and to alert campaign or party headquarters of notable activities.⁵⁷ In addition to observing the polling place on Election Day, the Virginia Code gives candidates and parties the ability to have observers at several other important events throughout the election. First, candidates and parties can send observers to watch the inspection of voting equipment prior to the commencement of voting to ensure that the counters all register zero.⁵⁸ Second, observers can be present when the vote is tabulated after the polls close at the end of Election Day.⁵⁹ Third, observers can monitor the opening of provisional ballots and determination of validity.⁶⁰ Prior to 2010, these observers had to be registered voters in the locality where they were observing.⁶¹ The General Assembly modified that requirement to allow any Virginia-registered voter to be a poll watcher in any voting precinct in the commonwealth.⁶² The same legislation also allowed poll watchers to use a wireless device while observing, provided the device did not contain a camera.⁶³

E. *Primaries*

The 2011 session brought a number of changes to the 2011 and 2012 primary schedules. In order to give time for the passage of redistricting legislation and completion of the Voting Rights Act preclearance process, the General Assembly moved the 2011 pri-

55. Act of Apr. 13, 2010, ch. 707, 2010 Va. Acts 1280, 1283 (codified as amended at VA. CODE ANN. § 24.2-604(K) (Cum. Supp. 2010)).

56. *See id.*

57. *See* Laurence Hammack, *Election Day Volunteer Poll-Watchers: They're Watching, Not Staring*, ROANOKE TIMES, Nov. 2, 2008, at A1.

58. VA. CODE ANN. § 24.2-639 (Repl. Vol. 2011).

59. *Id.* § 24.2-655 (Repl. Vol. 2011).

60. *Id.* § 24.2-653 (Repl. Vol. 2011).

61. *Id.* § 24.2-604 (Repl. Vol. 2006).

62. Act of Apr. 11, 2010, ch. 448, 2010 Va. Acts 802, 802 (codified as amended at VA. CODE ANN. § 24.2-604(C) (Cum. Supp. 2010)).

63. *Id.* at 803.

mary to August 23, 2011.⁶⁴ Because of the uncertainty of the timelines for completing the full redistricting process, the final legislation gave the State Board the flexibility to move filing dates leading up to the primary in case redistricting and pre-clearance were not completed in time for the primary.⁶⁵

As a result of joint changes by the Republican National Committee (“RNC”) and Democratic National Committee (“DNC”) to their delegate selection rules,⁶⁶ the 2012 and future presidential primaries will move from the second Tuesday in February to the first Tuesday in March.⁶⁷ Under the RNC and DNC rules changes, any state—other than Iowa, New Hampshire, South Carolina, and Nevada—that selects their delegates to the national convention prior to March 1 of the presidential election year would face penalties.⁶⁸ Virginia moved its primary to March to avoid these penalties. An additional change under this same legislation is a provision that permits Virginia political parties to allocate their national convention delegates among the presidential candidates according to the proportional vote received in the primary if the party has determined that its delegates and alternates are selected pursuant to the primary.⁶⁹ This change was also the result of RNC and DNC rules changes that required states holding primaries prior to April 1 to use proportional allocation of delegates to give more states the ability to impact the presidential nomination process.⁷⁰

64. Act of Feb. 17, 2011, ch. 3, 2011 Va. Acts ____ (codified as amended in scattered sections of the VA. CODE ANN. (Repl. Vol. 2011)).

65. *Id.*

66. REPUBLICAN NAT’L COMM., RULES OF THE REPUBLICAN PARTY, R. 15(b) (2010) [hereinafter REPUBLICAN PARTY RULES]; DEMOCRATIC NAT’L COMM., DELEGATE SELECTION RULES FOR THE 2012 DEMOCRATIC NATIONAL CONVENTION, R. 11(A) (2010) [hereinafter DEMOCRATIC PARTY RULES].

67. Act of Mar. 25, 2011, ch. 584, 2011 Va. Acts ____ (codified as amended at of VA. CODE ANN. § 24.2-544(A) (Repl. Vol. 2011)); Act of Mar. 25, 2011, ch. 570, 2011 Va. Acts ____ (codified as amended at VA. CODE ANN. § 24.2-544(A) (Repl. Vol. 2011)).

68. See REPUBLICAN PARTY RULES, *supra* note 66; DEMOCRATIC PARTY RULES, *supra* note 66.

69. Ch. 584, 2011 Va. Acts ____; ch. 570, 2011 Va. Acts ____.

70. See REPUBLICAN PARTY RULES, *supra* note 66; DEMOCRATIC PARTY RULES, *supra* note 66, at R. 10(C).

F. *Removal of Officers*

In 2011, the General Assembly enacted a bill giving leeway to a member of a local governing body or elected school board or mayor who is required to take an oath of office.⁷¹ Specifically, the General Assembly changed the law so that the failure of such officials to take his required oath of office “before attending the first meeting of the governing body or school board held after his election shall not be deemed to create a vacancy in his office provided that he takes the oath within [thirty] days after that first meeting.”⁷² Under prior law, the failure to take the required oath of office prior to participating in the first meeting of a local governing body or school board created a vacancy in the office.⁷³ Such vacancy was then filled by a special election.⁷⁴

G. *Recounts*

In an effort to increase the integrity of the recount process, the 2011 General Assembly enacted legislation to require a hand count of optical scan ballots if, during the recount, the “total number of paper ballots reported as counted by the tabulator plus the total number of ballots set aside by the tabulator do not equal the total number of ballots rerun through the tabulator.”⁷⁵ This process should increase the likelihood that all ballots are properly counted should there be issues with the rerunning of ballots through the tabulator.

H. *Campaign Finance*

While there was a dearth of campaign finance legislation in the 2011 General Assembly, the 2010 General Assembly enacted three measures related to the reporting and receipt of campaign donations. In an attempt to further clarify that campaign funds are not to be used for personal use by candidates, the 2010 Gen-

71. See Act of Mar. 14, 2011, ch. 78, 2011 Va. Acts ____ (codified as amended at VA. CODE ANN. § 24.2-228(D) (Repl. Vol. 2011)).

72. *Id.*

73. See VA. CODE ANN. § 15.2-1522 (Repl. Vol. 2008 & Cum. Supp. 2011).

74. See *id.* § 24.2-228(A) (Repl. Vol. 2011).

75. Act of Mar. 25, 2011, ch. 522, 2011 Va. Acts ____ (codified as amended at VA. CODE ANN. § 24.2-802(D)(3) (Repl. Vol. 2011)).

eral Assembly enacted legislation that required the State Board to distribute “a written explanation prepared by the Attorney General of the provisions of the [Campaign Finance] Act that prohibit the personal use of campaign funds.”⁷⁶ The law specifically required the explanation to “delineate the differences between prohibited personal uses of campaign funds and permitted uses of the funds.”⁷⁷ This legislation was a result of varying interpretations of what constituted personal use of campaign funds.⁷⁸

The General Assembly enacted provisions that restrict public access to certain campaign information that candidates store in the campaign finance reporting software provided by the State Board.⁷⁹ Specifically, any information that is not required to be disclosed on a campaign finance report, but is nevertheless stored within the state sponsored software, will be protected from public disclosure.⁸⁰

Finally, the General Assembly repealed a law enacted in 2004 that required governing body members during non-election years to report campaign contributions of \$500 or more within fifteen business days of receipt.⁸¹

I. *Campaign Advertisements*

1. Identification Related to Campaign Telephone Calls

In 2010, the General Assembly took steps to provide greater transparency to disclosing the sponsor of campaign telephone calls to voters. The General Assembly made it “unlawful for any candidate or candidate campaign committee making campaign telephone calls to intentionally modify the caller identification information of any campaign telephone call for the purpose of mis-

76. Act of Apr. 8, 2010, ch. 268, 2010 Va. Acts 374, 375 (codified as amended at VA. CODE ANN. § 24.2-946(E) (Cum. Supp. 2010)).

77. *Id.*

78. *Part III: Campaign Finance—The Rules if You Can Find Them*, ROANOKE FREE PRESS, Sept. 26, 2010, <http://www.roanokefreepress.com/?p=10230>.

79. See Act of Apr. 8, 2010, ch. 297, 2010 Va. Acts 420, 421 (codified as amended at VA. CODE ANN. § 24.2-946.2 (Cum. Supp. 2010)).

80. *Id.* (codified as amended at VA. CODE ANN. § 24.2-946.2(A) (Cum. Supp. 2010)).

81. Act of Apr. 12, 2010, ch. 696, 2010 Va. Acts 1263, 1263–64 (codified as amended at VA. CODE ANN. § 24.2-948.1(C) (Cum. Supp. 2010)).

leading the recipient as to the identity of the caller.”⁸² Moreover, if the calls are automated and

caller identification information includes a name associated with the telephone number, then the caller identification information shall include either the name of the candidate or candidate campaign committee that has authorized and is paying for the calls, or the vendor conducting the calls on behalf of the candidate or candidate campaign committee.⁸³

This prohibition and disclosure requirement is also applicable to “any person, corporation, or political committee making campaign telephone calls.”⁸⁴ These provisions ensure that recipients of the campaign telephone calls can determine who is responsible for the call prior to answering the phone.

2. Notice Related to Finding of Violation and Assessment of Civil Penalties

In 2010, the General Assembly enacted procedural protections for candidates and others with regard to the State Board ability to assess civil penalties for violations of Virginia’s Election Code.⁸⁵ The legislation stems from an incident with the patron of the legislation. The patron was assessed a fine by the State Board’s for failing to place the required disclaimer on his campaign website.⁸⁶ The State Board mailed notice of the alleged violation to the legislator; however, the legislator contended he never received the notice or the State Board’s intended action.⁸⁷ The State Board is now required to conduct a public hearing to determine whether a violation has occurred and whether to assess a penalty.⁸⁸ Additionally, the State Board is now required to “send notice by certified mail to persons whose actions will be reviewed at such meeting and may be subject to civil penalty.”⁸⁹ Such notice must be sent “[a]t least [ten] days prior to such hearing . . .

82. Act of Apr. 10, 2010, ch. 323, 2010 Va. Acts 469, 470 (codified as amended at VA. CODE ANN. § 24.2-959 (Cum. Supp. 2010)).

83. *Id.*

84. *Id.* (codified as amended at VA. CODE ANN. § 24.2-959.1 (Cum. Supp. 2010)).

85. Act of Apr. 11, 2010, ch. 546, 2010 Va. Acts 1002, 1003 (codified as amended at VA. CODE ANN. § 24.2-955.3(D) (Cum. Supp. 2010)).

86. See Michael Sluss, *Ware Fined \$500 Over Web Site Violation*, ROANOKE TIMES, Nov. 24, 2009, at A12.

87. *Id.*

88. Ch. 546, 2010 Va. Acts at 1003.

89. *Id.*

and . . . shall include the time and date of the meeting, an explanation of the violation, and the maximum civil penalty that may be assessed.”⁹⁰

J. Election-Related Cases and Inquiries

1. Attorney General Election-Related Investigation

During the 2010 elections in Montgomery County there was an incident involving the operation of the electronic poll books.⁹¹ The electronic poll books were not properly started on the morning of the election and could not be used to check off persons as having voted.⁹² Rather than following state law requirements to use provisional ballots, the officers of election instead allowed those persons in line to vote on the electronic voting machines while writing their names down on paper as having voted.⁹³ Without the ability to compare the name of the person voting with the information contained in the electronic poll book, there was no opportunity to determine, at that moment, whether the person was properly registered to vote in that precinct. Allowing the individuals to vote on the electronic voting machines, as opposed to provisional paper ballots, created a situation where improperly cast ballots would nonetheless be counted, because there would be no opportunity to extract any miscast ballots from the electronic voting machine.⁹⁴ Although approximately 750 voters were allowed to vote using this procedure, all were subsequently determined “as being properly registered voters in Montgomery.”⁹⁵ However, thirteen voters were allowed to vote in the wrong precinct, making those votes “improperly cast and improperly counted.”⁹⁶

The incident resulted in an investigation by the Virginia Attorney General.⁹⁷ The Attorney General’s office issued findings in

90. *Id.*

91. Press Release, Va. Office of the Att’y Gen., Statement of Senior Assistant Att’y Gen. Joshua Lief Regarding the Attorney General’s Investigation into the November 2, 2010 Election in Montgomery County (Apr. 29, 2011) (on file with author).

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

the case and concluded that “it [was] clear that a violation of election law occurred in the county on November 2, 2010. It [was] also clear that it was not to attempt to corrupt the election, alter the results or allow non-registered voters to vote.”⁹⁸ As a result of the investigation, the State Board issued a formal censure of the general registrar and certain members of the local electoral board.⁹⁹

2. Petitions

In order for a candidate to qualify for an election or to get certain local referenda on the ballot, candidates or supporters of the ballot question must get Virginia voters to sign a petition.¹⁰⁰ Prior to 2010, the statutes provided that voters signing the petition “shall” provide their social security number on the petition.¹⁰¹ The requirement was tempered, however, because failure to list a social security number did not invalidate the voter’s signature.¹⁰² Because voters may not have been aware of this provision, the requirement was changed to state that voters “may” provide only the last four digits of their social security number.¹⁰³ The provisions related to candidate qualification petitions were changed in 2010,¹⁰⁴ and the provision related to local referendum petitions was changed in 2011.¹⁰⁵

In 2010, Herb Lux sought to qualify as an independent candidate for the U.S. House of Representatives in the Seventh Congressional District.¹⁰⁶ Lux, who lived outside of the district, circulated a number of his own petitions.¹⁰⁷ After Lux submitted the

98. *Id.*

99. See Press Release, Va. State Bd. of Elections, Letter of Censure (May 25, 2011) (on file with author); see also Michael Sluss, *State Election Panel Formally Censures Wertz, Other Montgomery Election Officials*, ROANOKE TIMES, May 25, 2011, <http://www.roanoke.com/news/nrv/breaking/wb/287707>.

100. VA. CODE ANN. § 24.2-506 (Repl. Vol. 2011) (regulating candidates); *id.* § 24.2-684.1 (Repl. Vol. 2011) (regulating local referenda).

101. *Id.* §§ 24.2-506, -684 (Repl. Vol. 2006).

102. *Id.* (Repl. Vol. 2006).

103. See *id.* § 24.2-684.1 (Repl. Vol. 2011).

104. Act of Apr. 7, 2010, ch. 215, 2010 Va. Acts 218, 298 (codified as amended at VA. CODE ANN. § 24.2-506 (Cum. Supp. 2010)).

105. Act of Mar. 22, 2011, ch. 333, 2011 Va. Acts ____ (codified as amended at VA. CODE ANN. § 24.2-684.1 (Repl. Vol. 2011)).

106. *Lux v. Rodrigues*, 736 F. Supp. 2d 1042, 1044 (E.D. Va. 2010).

107. *Id.*

petitions to the State Board, the State Board informed Lux that the petitions he circulated would not be counted, as doing so would violate the state law on residency of petition circulators.¹⁰⁸ Lux challenged this decision, arguing that the prohibition on gathering signatures for his candidacy because he lived outside the district violated his First and Fourteenth Amendment rights.¹⁰⁹ The United States District Court for the Eastern District of Virginia rejected the claims and dismissed the case.¹¹⁰ Lux appealed the denial of the injunction, and Chief Justice John Roberts, Circuit Justice for the Fourth Circuit, rejected the application, finding that Lux's right to relief was not "indisputably clear."¹¹¹ The Court of Appeals for the Fourth Circuit reversed the holding of the district court, in part, and remanded the case back, finding that the Fourth Circuit precedent relied on by the district court had been superseded by subsequent United States Supreme Court decisions.¹¹²

III. GOVERNMENTAL ETHICS REFORM

A. *House of Delegates and Senate Ethics Panel Reform*

In the late summer and fall of 2009, a prominent legislator was accused of supporting a state appropriation in exchange for employment with the entity seeking the additional state funding.¹¹³ These accusations came to light in the midst of the legislator's re-election campaign.¹¹⁴ As a result of the accusations, the House Ethics Advisory Panel (the "Panel") opened an investigation into whether the house member had violated the General Assembly Conflict of Interests Act.¹¹⁵

108. *Id.* at 1045 (citing VA. CODE ANN. § 24.2-50 (Repl. Vol. 2006)).

109. *Id.* at 1044.

110. *Id.* at 1051.

111. *Lux v. Rodrigues*, 131 S. Ct. 5, 7 (2010).

112. *Lux v. Judd*, No. 10-1997, 2011 U.S. App. LEXIS 13671, at *12-14 (4th Cir. July 6, 2011).

113. Bill Sizemore & Julian Walker, *As Criticism Mounts, Del. Hamilton Rejects Plea to Resign*, VIRGINIAN-PILOT, Aug. 24, 2009, at B1.

114. Julian Walker, *Del. Phil Hamilton Quits House Amid Ethics Inquiries*, VIRGINIAN-PILOT, Nov. 17, 2009, at A1.

115. Bill Sizemore & Julian Walker, *Hamilton's ODU Deal Spurs State Ethics Inquiry*, VIRGINIAN-PILOT, Aug. 25, 2009, at A1.

The legislator lost his re-election bid and faced the prospect of a hearing before the Panel.¹¹⁶ Rather than move forward with a hearing, the lame-duck legislator resigned his house seat in December 2009.¹¹⁷ As a result of his resignation, the Panel determined that it lacked jurisdiction to proceed with its inquiry.¹¹⁸

With this backdrop, the 2010 General Assembly enacted several reforms related to the process and procedures used by the House and Senate Ethics Advisory Panels to determine whether a member has violated the law.¹¹⁹ The law now provides that no one who is a registered lobbyist under Virginia Code section 2.2-422 may serve as a member of either the House or Senate Ethics Advisory Panel.¹²⁰ Both advisory panels are now required to make available to the public “[r]ecords related to a complaint that has proceeded to an inquiry beyond a preliminary investigation.”¹²¹ The General Assembly also provided that the panels shall establish “rules for the conduct of open meetings and hearings.”¹²²

The General Assembly also raised the bar for members filing an ethics complaint. Specifically, the law now provides that a complaint must be “subscribed by the maker as true under penalty of perjury.”¹²³ Moreover, no complaint shall be accepted by the Panel within “[sixty] or fewer days before a primary election or other nominating event or before a general election in which the cited legislator is running for office.”¹²⁴ The General Assembly also engaged a pleading standard to give guidance to the advisory panels for what constitutes a sufficient complaint. Specifically, the Panel “shall determine, during its preliminary investigation, whether the facts stated in the complaint taken as true are sufficient to show a violation of [the General Assembly Conflict of Interests Act].”¹²⁵ The Panel is required to dismiss the complaint “[i]f the facts, as stated . . . fail to give rise to such a violation.”¹²⁶

116. Walker, *supra* note 114, at A1.

117. *See id.*

118. *Id.*

119. Act of May 21, 2010, ch. 876, 2010 Va. Acts 2728, 2728–30 (codified as amended in scattered sections of VA. CODE ANN.).

120. *Id.*

121. *Id.* at 2729 (codified as amended at VA. CODE ANN. § 30-113.1 (Cum. Supp. 2010)).

122. *Id.* (codified as amended at VA. CODE ANN. § 30-113 (Cum. Supp. 2010)).

123. *Id.* (codified as amended at VA. CODE ANN. § 30-114(A) (Cum. Supp. 2010)).

124. *Id.*

125. *Id.* (codified as amended at VA. CODE ANN. § 30-114(B) (Cum. Supp. 2010)).

126. *Id.*

However, if the factual allegations in the complaint do give rise to potential a violation of the General Assembly Conflict of Interest Act, “the Panel shall request that the complainant appear and testify under oath as to the complaint and the allegations therein.”¹²⁷ If the Panel “fails to find by a preponderance of the evidence that [a] violation has occurred,” it shall dismiss the complaint.¹²⁸ If it determines, by preponderance of the evidence, that a violation has occurred, the Panel is required to proceed with an inquiry.¹²⁹

Prior to the 2010 amendments there was no requirement that the Panel conduct its hearings publicly. Now, “[o]nce the Panel has determined to proceed with an inquiry, its meetings and hearings shall be open to the public.”¹³⁰ Finally, the resignation of a legislator will no longer serve to deprive the Panel of jurisdiction over an investigation. The law now explicitly requires the Panel to “complete its investigations and dispose of the matter . . . notwithstanding the resignation of the legislator during the course of the Panel’s proceedings.”¹³¹

B. “Pay-to-Play” Legislation

As part of his 2009 campaign for governor, Bob McDonnell pledged to seek legislation that would address “pay-to-play” concerns in the state procurement process.¹³² In 2010, the General Assembly added a restriction prohibiting the governor, his political action committee, or the governor’s cabinet secretaries from knowingly soliciting or accepting a gift or campaign contribution with a value of more than \$50 from someone with a pending bid or proposal with the state.¹³³ The restriction applies to bids or proposals under the Virginia Public Procurement Act, Public-Private Transportation Act, or the Public-Private Education Facilities and Infrastructure Act with a value of \$5 million or great-

127. *Id.*

128. *Id.*

129. *See id.*

130. *Id.* at 2730 (codified as amended at VA. CODE ANN. § 30-114(C) (Cum. Supp. 2010)).

131. *Id.* (codified as amended at VA. CODE ANN. § 30-114(D) (Cum. Supp. 2010)).

132. *Government Reform: Open and Honest Government Plan*, GOVERNOR BOB McDONNELL, http://www.bobmcdonnell.com/index.php/issues/government_reform.

133. Act of Apr. 13, 2010, ch. 732, 2010 Va. Acts 1317 (codified as amended at VA. CODE ANN. §§ 2.2-3104.1(A), -4376.1(A) (Cum. Supp. 2010)).

er, but does not apply to contracts awarded through competitive, sealed bidding.¹³⁴ Violators of this provision face civil penalties of \$500 or up to two times the amount of the contribution or gift, whichever is greater.¹³⁵ In 2011, the General Assembly tweaked the legislation to make clear that its provisions only applied to procurements by executive branch agencies and not to procurements by colleges, universities, or independent agencies.¹³⁶ The 2011 change also made clear that only knowing violations of the act were sanctionable.¹³⁷

IV. LEGISLATIVE REDISTRICTING

Following the 2010 census, Virginia immediately began its decennial redistricting of state legislative and congressional districts. As one of only four states that hold state legislative elections in the same year as the release of the census data,¹³⁸ Virginia's redistricting process must take place relatively quickly compared to other states.

The constitutional provisions regarding redistricting are fairly straightforward. The Virginia Constitution requires that redistricting for the House of Delegates, Senate of Virginia, and U.S. House of Representatives take place "in the year 2011 and every ten years thereafter."¹³⁹ It additionally requires that "[e]very electoral district shall be composed of contiguous and compact territory and shall be so constituted as to give, as nearly as is practicable, representation in proportion to the population of the district."¹⁴⁰

In the fall of 2010, prior to the release of the census data, the House and Senate Privileges and Elections Committees began holding public hearings around the commonwealth to receive pub-

134. *Id.* (codified as amended VA. CODE ANN. § 2.2-3104.01(A) (Cum. Supp. 2010)).

135. *Id.* (codified as amended at VA. CODE ANN. § 56-573.3(A) (Cum. Supp. 2010)).

136. *See* Act of Mar. 26, 2011, ch. 624, 2011 Va. Acts ____ (codified as amended in scattered sections of VA. CODE ANN.).

137. *Id.*

138. *See* Rosalind S. Helderman, *Va. Gets Set for Battle to Redraw Districts*, WASH. POST, Feb. 1, 2011, at B5.

139. VA. CONST. art. II, § 6.

140. *Id.*

lic comments on the upcoming redistricting process.¹⁴¹ Then, on January 10, 2011, Governor Bob McDonnell signed an executive order creating the Independent Bipartisan Advisory Commission on Redistricting ("Commission").¹⁴² This Commission, the first of its kind in Virginia,¹⁴³ fulfilled one of McDonnell's campaign promises.¹⁴⁴ The Commission was made up of a bipartisan group including former elected officials, former governors' cabinet members, two former secretaries of the State Board, two retired judges, and other respected Virginians.¹⁴⁵ The Commission held public hearings and submitted a report to the General Assembly and the governor proposing model plans that were more compact and split fewer localities than previous redistricting plans.¹⁴⁶

The 2011 round of redistricting brought another first—the Virginia College and University Legislative Redistricting Competition. Professors at two Virginia universities, George Mason University and Christopher Newport University, worked together to create the competition in which college and university students could design redistricting plans to compete for cash prizes.¹⁴⁷ The plans were judged on "contiguity, equipopulation, the federal Voting Rights Act, communities of interest that are respectful of existing political subdivisions, compactness, electoral competition; and representational fairness."¹⁴⁸

On February 3, 2011, the U.S. Census Bureau released the 2010 census data for Virginia.¹⁴⁹ During the 2011 regular session, the General Assembly considered a resolution calling for a special

141. See OFFICE OF THE ATT'Y GEN., COMMONWEALTH OF VA., LEGISLATIVE HISTORY OF 2011 VIRGINIA GENERAL ASSEMBLY REDISTRICTING PLANS (2011), http://redistricting.dls.virginia.gov/2010/Data/Ref/DOJSubmission2011/Attachment_17_H&S.pdf.

142. Exec. Order No. 31 (2011) (Jan. 10, 2011).

143. Associated Press, *After a Veto, House, Senate Resume Remapping Work*, PILOT ONLINE (Apr. 24, 2011), <http://hamptonroads.com/2011/04/after-veto-house-senate-resume-remapping-work>.

144. GOVERNOR BOB MCDONNELL, *supra* note 132.

145. Press Release, Office of the Governor, Governor Establishes Independent Bipartisan Redistricting Commission (Jan. 10, 2011) (on file with author).

146. See INDEP. BIPARTISAN ADVISORY COMM'N ON REDISTRICTING, THE PUBLIC INTEREST IN REDISTRICTING (2011) (on file with author).

147. Press Release, Christopher Newport Univ., Virginia Congressional Redistricting Competition Announced (Dec. 3, 2010) (on file with author).

148. VA. REDISTRICTING COMPETITION, <http://www.varedistrictingcompetition.org/> (last visited Oct. 12, 2011).

149. Press Release, U.S. Census Bureau, U.S. Census Bureau Delivers Virginia's 2010 Census Population Totals, Including First Look at Race and Hispanic Origin Data for Legislative Redistricting (Feb. 3, 2011) (on file with author).

session of the General Assembly to consider redistricting.¹⁵⁰ After adopting two amendments addressing the circumstances under which the General Assembly could get called back into special session,¹⁵¹ the two houses garnered the requisite two-thirds vote needed for the resolution.¹⁵² The governor reciprocated by issuing a proclamation calling for the special session.¹⁵³ Immediately upon adjournment *sine die* of the 2011 regular session, the General Assembly convened the special session and recessed to allow the two houses to work on the redistricting legislation.¹⁵⁴

In the house, the legislation proposing new house districts advanced relatively smoothly. The bill, sponsored by Delegate Chris Jones, passed in the house 86 to 8 and proceeded to the senate.¹⁵⁵ The house plan had a deviation of 1% from the ideal population and included the same number of majority-minority districts.¹⁵⁶

In the senate, the process was slightly more divided. The debate began in the Senate Privileges and Elections Committee to craft the resolution governing the redistricting process. The Democrats on the committee sought a maximum deviation of 2% from the ideal population, arguing that it would help keep localities and communities of interest intact.¹⁵⁷ Meanwhile, Republicans sought .5% deviation, arguing that technological improvements and fewer districts, compared to the House of Delegates, made a

150. H.J. Res. No. 986, Va. Gen. Assembly (Reg. Sess. 2011).

151. S. JOURNAL, Senate of Va., Reg. Sess. ____ (2011), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?111+amd+HJ986ASE>.

152. See H.J. Res. No. 986.

153. H.J. Res. 5002, Va. Gen. Assembly (Spec. Sess. 2011).

154. The House adjourned *sine die* at 7:01 p.m., and was then called to order at 7:02 p.m. H. JOURNAL, House of Delegates of Va., Reg. Sess. ____ (2011), available at <http://leg1.state.va.us> (follow “2011: House Minutes” then follow “February 27, 2011” hyperlink); H. JOURNAL, House of Delegates of Va., Spec. Sess. ____ (2011), available at <http://leg1.state.va.us> (follow “2011 Special I” hyperlink; then follow “February 27, 2011” hyperlink). The Senate adjourned *sine die* at 7:03 p.m. and was called to order at 7:04 p.m. S. JOURNAL, Senate of Va., Reg. Sess. ____ (2011), available at <http://leg1.state.va.us> (follow “2011 Session: Senate Minutes” hyperlink; follow “February 27, 2011” hyperlink); S. JOURNAL, Senate of Va., Spec. Sess. ____ (2011), available at <http://leg1.state.va.us> (follow “2011 Special I” hyperlink; then follow “Senate Minutes” hyperlink; then follow “February 27, 2011” hyperlink).

155. H. JOURNAL, House of Delegates of Va., Spec. Sess. ____ (2011), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?112+sum+HB5001>.

156. OFFICE OF THE ATTORNEY GEN., *supra* note 141.

157. Chelyen Davis, *House Committee Sets 1 Percent Deviation for Redrawing Legislative Districts, Senate Panel Opts to Stay at 2 Percent*, FREE LANCE-STAR, Mar. 26, 2011, http://fredericksburg.com/News/FLS/2011/032011/03262011/615911/index_html?page=1.

smaller population deviation easier.¹⁵⁸ With the majority of the votes on the committee, the Democrats prevailed by passing their version of the resolution with 2% deviation.¹⁵⁹

Three senate redistricting plans received the most initial attention. The first plan, sponsored by Senator Janet Howell (D-Fairfax), was supported by the senate Democratic caucus.¹⁶⁰ The second plan, sponsored by Senator John Watkins (R-Powhatan), was supported by the senate Republicans.¹⁶¹ The third plan was created by students from the College of William & Mary as part of the college redistricting competition and was introduced by Senator John Miller (D-Newport News).¹⁶²

After the house bill was communicated to the senate, the Senate Privileges and Elections Committee amended the house bill to add Senator Howell's senate redistricting.¹⁶³ The amendment passed with all Democrats on the committee voting in favor and all Republicans voting against.¹⁶⁴ The full senate then passed roughly the same bill again on a party line vote, with a few changes that addressed some technical concerns.¹⁶⁵ The bill, now including both a house and senate redistricting plan, was communicated to the house for their action.¹⁶⁶ The house rejected the senate amendments to the bill—not because of objections to the amendment, but to make additional technical corrections to the

158. *Id.*; S. Res. 502 (Spec. Sess. 2011), available at <http://lis.virginia.gov/cgi-bin/legp604.exe?112+ful+SR502>.

159. Dwayne Yancey, *Smith Blasts Democratic Redistricting Plan as 'a Travesty'*, ROANOKE TIMES (Mar. 3, 2011, 5:05_), <http://blogs.roanoke.csm/politics/2011/03/30/smith-blasts-democratic-redistricting-plan-as-a-travesty/>.

160. *Senate Republicans Offer Up Competing Redistricting Plan, Norment Slams Democrats*, THE SHAD PLANK (Mar. 29, 2011), http://hrblogs.typepad.com/the_shad_plank/2011/03/senate-republicans-offer-up-competing-redistricting-plan-norment-slams-democrats.html.

161. *Id.*

162. See OFFICE OF ATT'Y GEN., *supra* note 141.

163. H. JOURNAL, House of Delegates of Va., Spec. Sess. ____ (2011), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?112+sum+HB5001>.

164. See S. JOURNAL, Senate of Va., Spec. Sess. ____ (2011), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?112+vot+S08V0003+HB5001>; 2011 Telephone List, Senate of Va., [http://sov.state.va.us/SenatorDB.nsf/\\$\\$Viewtemplate+for+WmembershipHome?OpenForm](http://sov.state.va.us/SenatorDB.nsf/$$Viewtemplate+for+WmembershipHome?OpenForm) (last visited Oct. 12, 2011) [hereinafter Senate Affiliation List] (listing the delegates and their party affiliation).

165. See S. JOURNAL, Senate of Va., Spec. Sess. ____ (2011), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?112+vot+SV0026+HB5001+HB5001>; Senate Affiliation List, *supra* note 164.

166. See H. JOURNAL, House of Delegates of Va., Spec. Sess. (2011), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?112+sum+HB5001>.

bill.¹⁶⁷ After the senate insisted on their amendments, a conference committee was named.¹⁶⁸ The conferees agreed to a plan later that same day, and both chambers passed the bill that evening.¹⁶⁹ The senate approved the conference report 22 to 17 with all Democrats voting aye and all Republicans voting no.¹⁷⁰ The house approved the conference report 85 to 9 with all nine opposing votes coming from Democrats.¹⁷¹

With both chambers passing the conference report, the bill came to the desk of Governor McDonnell. Since the General Assembly had not adjourned and was still in special session, he had seven days after the bill was presented to him to sign, amend, or veto the bill.¹⁷² On April 15, 2011, Governor McDonnell vetoed House Bill 5001, submitting a letter to the General Assembly outlining his reasons for the veto.¹⁷³ The letter singled out the senate plan and highlighted three main deficiencies that he saw with the legislation.¹⁷⁴ First, he claimed that the districts in the senate plan were not compact and failed to keep localities and communities of interest intact.¹⁷⁵ Second, the governor argued that the senate plan did not provide for sufficient population equality among districts, raising a possible violation of the United States and Virginia Constitutions.¹⁷⁶ Third, the governor raised a concern that the senate plan was “the kind of partisan gerrymandering that Virginians have asked that we leave in the past.”¹⁷⁷ Pointing out the lack of Republican votes for the plan, he requested a revised plan that passed with bipartisan support in the sen-

167. OFFICE OF ATT’Y GEN., *supra* note 141.

168. S. JOURNAL, Senate of Va., Spec. Sess. ____ (2011), *available at* <http://leg1.state.va.us/cgi-bin/legp504.exe?112+sum+HB5001>.

169. *See id.*

170. S. JOURNAL, Senate of Va., Spec. Sess. ____ (2011), *available at* <http://leg1.state.va.us/cgi-bin/legp504.exe?112+vot+SV0030HB5001+HB5001> (noting that Senator Fred Quayle (R-Chesapeake) did not vote); *see* 2011 Telephone List, Va. House of Delegates, <http://del.state.va.us/dela/MemBios.nsf/MWebsiteTL?OpenView> (last visited Oct. 12, 2011) [hereinafter Delegate Party Affiliation List] (listing all delegates and their party affiliation).

171. H. JOURNAL, House of Delegates of Va., Spec. Sess. ____ (2011), *available at* <http://leg1.state.va.us/cgi-bin/legp504.exe?112+vot+HV1786+HB5001>; Delegate Party Affiliation List, *supra* note 170.

172. VA. CONST. art. V, § 6.

173. GOVERNOR’S VETO LETTER FOR H.B. 5001 (Apr. 15, 2011) (on file with author).

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

ate.¹⁷⁸ He asked the General Assembly to immediately work to devise a plan that addressed these concerns.¹⁷⁹

The General Assembly's reaction to the governor's veto was, at best, mixed. Senate Republicans cheered the move while Senate Democrats took a strong defensive stance in favor of the plan they had sent the governor.¹⁸⁰ Senate Majority Leader Dick Saslaw (D-Fairfax) initially said that the Senate Democrats were "not going to change one period or one comma."¹⁸¹ The House of Delegates, responding to the governor's encouragement "to pursue opportunities that will strengthen its plan,"¹⁸² quickly passed a new bill out of committee that reunited some precincts that were split in the previous plan.¹⁸³ The house did not pass the bill out of their chamber, though, giving the bill only the first of its three required readings before recessing to allow negotiations on the senate plan to take place.¹⁸⁴ Meanwhile, the Senate Democrats backed off of their initial statements and began working with Governor McDonnell and staff to create a revised plan that the governor would sign.¹⁸⁵ As the negotiations continued, tensions grew as fears developed of a legislative stalemate that could leave redistricting to the courts. Three voter lawsuits were filed to begin the process of having the courts draw the lines.¹⁸⁶ After a week of negotiations, the various sides came together and agreed to a plan

178. *Id.*

179. *Id.*

180. Tyler Whitley, *McDonnell Vetoes Legislature's Redistricting Plan*, RICH. TIMES-DISPATCH, Apr. 16, 2011, at A1.

181. *Id.*

182. GOVERNOR'S VETO LETTER FOR H.B. 5001 (Apr. 15, 2011) (on file with author).

183. H.B. 5004, Va. Gen. Assembly (Spec. Sess. 2011); *Redistricting: Hearing on H.B. 5004 Before the H. Comm. on Privileges & Elections*, 2011 Leg., Spec. Sess. 3:21-24 (Va. 2011) (statement of Del. Bill Janis, Member, H. Comm. on Privileges & Elections), http://redistricting.dls.virginia.gov/2010/Data/Public%20Hearings/House/041111_HouseP&E_mtg_transcript.pdf.

184. See H. JOURNAL, House of Delegates of Va., Spec. Sess. ____ (2011), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?112+sum+HP5005>.

185. See Anita Kumar, *Senators, Governor's Office Negotiating on Redistricting Plan*, VA. POL. BLOG (Apr. 22, 2011, 11:44 AM), http://www.washingtonpost.com/blogs/virginia-politics/post/senators-governors-office-negotiating-on-redistricting-plan/2011/04/22/AFFvgJPE_blog.html.

186. *Burch v. Va. Bd. of Elections*, No. 3:11CV256 (E.D. Va. filed Apr. 19, 2011); *Carter v. Va. State Bd. of Elections*, No. 3:11CV00030 (W.D. Va. filed Apr. 18, 2011); *Klotz v. Virginia*, No. CL 11000638-00 (Hanover Cir. Ct. filed Apr. 22, 2011).

that garnered bipartisan support in the senate, passing 32 to 5.¹⁸⁷ The house passed the bill the same day, and the governor signed it into law the next day.¹⁸⁸ On June 17, 2011, the U.S. Department of Justice granted preclearance to the legislation under section 5 of the Voting Rights Act of 1965.¹⁸⁹

Because congressional elections are not scheduled until 2012, the General Assembly did not have the same sense of urgency to pass a bill out. Delegate Bill Janis (R-Henrico) made the first move by proposing a bill for congressional redistricting that made modest changes to existing districts.¹⁹⁰ The house passed Delegate Janis's bill on April 12, 2011.¹⁹¹ The senate majority favored a plan proposed by Senator Mamie Locke (D-Hampton) that would include a "minority opportunity district," in addition to the existing minority-majority district.¹⁹² On June 9, 2011, the senate took up the house bill and amended it to include Senator Locke's redistricting plan.¹⁹³ The house, in turn, rejected the senate amendments, sending the bill to a conference committee.¹⁹⁴ As of this writing, the conference committee has not issued a report.

V. CONCLUSION

As can be seen, 2010 and 2011 were not years of major reforms in the election law arena, the exception being redistricting. As it does every ten years, redistricting took the spotlight and garnered much attention inside and outside of the halls of the Virginia General Assembly. Aside from this, the past two years have

187. Hugh Lessig, *Redistricting Stalemate Broken*, DAILY PRESS, Apr. 29, 2011, <http://articles.dailypress.com/news/politics/dp-nws-virginia-redistricting-0429-20110428-1-account-for-population-shifts-senate-plan-legislative-lines>.

188. H. JOURNAL, House of Delegates of Va., Spec. Sess. ____ (2011) (on file with author).

189. Letter from Thomas E. Perez, Assistant Att'y Gen., U.S. Dep't of Justice, to E. Duncan Getchell, Jr., Solicitor Gen., Commonwealth of Va. (June 17, 2011) (on file with author).

190. Michael Sluss, *House Panel Approves Congressional Redistricting Plan*, BLUE RIDGE CAUCUS BLOG (Apr. 11, 2011, 12:19 ____), <http://blogs.roanoke.com/politics/2011/04/11/house-panel-approves-congressional-redistricting-plan/>.

191. Amanda Iacone & Alissa Smith, *House OKs Congressional Districts, Senate Delays Debate*, VA. STATEHOUSE NEWS, Apr. 12, 2011, <http://virginia.statehousenewsonline.com/3495/house-oks-congressional-districts-senate-delays-debate/>.

192. Julian Walker, *Congressional Redistricting Talks Left to Select Group*, VIRGINIAN-PILOT, June 10, 2011, at B5.

193. *Id.*

194. *Id.*

seen a number of small but important changes to improve the administration of elections in the commonwealth and ethics within the government.